COLUMBIA LAW REVIEW.

VOL. XIII. FEBRUARY, 1913. No. 2

THE GENIUS OF THE COMMON LAW.

VIII. THE PERPETUAL QUEST.

In the foregoing lectures we have surveyed a certain number of our lady the Common Law's adventures, prosperous and otherwise. The stories I have tried to recall to memory rather than to tell anew are only a selection. It is quite likely that other men whose attention has been more particularly given to other branches of the law and its history might make other selections not less interesting and profitable. Accordingly, whatever the result may properly be called, it can hardly claim to make any systematic addition to the knowledge of our legal antiquities, and the legal antiquary who looks for anything of that kind will be disappointed, and may perhaps even accuse us of frivolity. We shall bear any such charge with equanimity, for the short reason that we did not go about to satisfy that kind of curiosity at all. The Common Law is not a museum of antiquities, but a living and active law, and our purpose has been to exhibit in the light of their past effects the faculties, the operations and the perils which to-day as much as ever enter into that life. I have no objection to antiquarian zeal; I own to a share of it myself. Antiquaries are for the most part good harmless folks enough, and when they excommunicate one another about cuneiform records or the origins of Ægean civilization, it is only their domestic amusement. But we did not go out to collect fossils this time. I do not want you to remember anything of what we have seen together save so far as it bears on the attitude of modern lawyers towards the perfectly living problems of their science and calling. There is only one opinion against which I have to take a stand of positive contradiction, the opinion, if any one seriously maintains it, that there is some date at which you can draw a line and say: Here

modern law begins, and only professors of legal history need know anything that lies behind it. There is no such line. You need not have read the Anglo-Saxon dooms or possess Dr. Liebermann's edition of them, but if you have heard nothing of either you may some day be quite practically baffled by an adversary talking nonsense about Anglo-Saxon institutions which you cannot see through and answer. You need not make a minute study of medieval French, but one day your client's interest may well depend on your ability to expose an inaccurate translation from a Year Book. But these, some one will say, are the extraordinary chances of the profession. If such things do come, why should they come to me? And is it worth my while to be ready for them? Perhaps not, we should answer, if you have made up your mind to expect nothing from your profession but food and shelter not falling below a certain standard of decency, and rising, if fortune will, to a fair share of the world's luxuries: as to which the measure and vicissitudes of the various degrees from clambake to champagne, from a catboat round Cape Cod to a yacht round the Mediterranean, will interest nobody but yourself. But if you have any ambition, then it is most certainly worth your while. In every calling, without exception that I know of, the difference between the merely adequate journeyman and the accomplished craftsman, who is really master of his art, is that the journeyman knows what to do with the usual task, but the artist knows what to do with an unusual one. The true craftsman may wait long for his opportunity, but when it comes he will never be taken for a journeyman again. It is the difference between being a slave of current rules, helpless outside their range, and using them as tools with mastery of the principles on which they depend; the same difference that shows itself on the highest planes of conduct and insight between ordinary good men and heroes or saints. Or, to put it in the most modest terms, the difference is between performance of the part that falls to you such that, as they say in New England, you guess it will have to do, and a performance that counts. And on the whole really good work does count even in this world.

Let it be granted then that we speak as among lawyers who have some professional ambition. I do not care whether its aim stops at acquiring the reputation of being a good lawyer, and being one as the surest way thereto, with the consequent prospect of advancement, or is touched, as I hope it often is, with the desire of justifying one's profession before the world's judgment

and leaving the science of the law in some way better than one found it. What shall be the attitude of a good lawyer and a good citizen towards the problems among which the lot of the Common Law is cast? He will recognize, in the first place, that they are alive and not to be solved out of a digest, and that the work is never finished. If it ever seemed to be finished, the law would have ceased to be a living science and would be fit for nothing more than to be petrified in an official Corpus Juris. For principles, even the most certain, are capable of infinite application, and the matter is always changing. The knights errant of our lady the Common Law must be abroad on a perpetual quest; no sooner is an adventure accomplished than a fresh one is disclosed or arises out of that very achievement. There is no strife in the past which has not some lesson for the future. Look back to the first point of our survey; does any one suppose that the great fight with formalism is over? There may be some happy jurisdiction (I do not know where it may be found) in which pleading is effectually reformed and statutes are few and simple. Let it be so, but one or two jurisdictions do not account for the Common Law. Formalism may be driven out of pleading, there may be no arguable points left on rules of procedure, but the hydra heads have their own devilish immortality, and will be grinning at you again in captious perversions of statute law. Courts have to be guided, legislators have to be warned. Not a word shall be said here in derogation of an advocate's duty to take every point that can fairly be taken for his client. Still there is a higher and a lower kind of advocacy, including work out of court, without any prejudice to the client's interest. Not long ago a learned friend of Lincoln's Inn was talking with me of a late eminent English conveyancing counsel whose pupil he had been, and whom he had often met later in conference. Other men might be as learned, said my friend, but I worked much with him, and whoever worked with him might be sure that he wanted to put the business through. That is in plain words, which no rhetorical expansion could better, the spirit of the law and the true lawyer. Ask yourself at every doubtful turn: What will best help the business through and you will have a good professional conscience and grateful clients.

Again there is a danger much akin to formalism and always besetting us. Our system is founded on precedent and respect for authorities. But this just and necessary respect, if not informed by a due measure of intelligent criticism, tends to degen-

erate into mechanical slavery. Perhaps that kind of corruption is harder to avoid in a country of uniform and centralized jurisdiction like England than under a federal constitution where judiciary power is distributed among many coördinate and independent courts, but the temptation exists everywhere. I have already mentioned its influence in British India. Practitioners bred to the Common Law and speaking its language as their mother tongue have less excuse than Indian pleaders. If they have learnt their trade rightly, they should have learnt to weigh as well as to count authorities. Any man who knows how to handle the professional apparatus of reference can find, with moderate industry, something like a show of authority for almost anything: and it is the delight of a certain class of advocates to snatch an advantage (though it is apt to be a fleeting one) by this method. But the law is not made by casual and hasty decisions in courts of first instance. Its guiding principles and the harmony of its controlling ideas must be sought in the considered judgments of the higher tribunals which command universal respect; and whatever is contrary to the general consent of leading authorities ought to be frankly discarded as erroneous. In any particular jurisdiction, to be sure, one may be bound by a particular eccentric doctrine which has gained an undeserved reception: such unfortunate accidents must be endured. Herein we may have also to face a temptation of the higher kind, such as theologians hold to be among the trials of the elect. A learned judge or textwriter often finds it a fascinating intellectual exercise to reconcile all the authorities bearing or seeming to bear on a given point; and with this purpose (which in itself is laudable enough) solutions of extreme ingenuity and subtilty are advanced. You may find striking examples in the work of a very learned English author whom the profession has recently lost, Mr. Thomas Beven. There comes a point, however, where such exercises of erudition serve only to "make that darker which was dark enough without." I venture to offer a rough working test. When you find an elaborate harmony of all the decisions expressed in a formula which it would be impossible to explain to a jury, then you may suspect that some of the decisions are wrong; and it may be the more profitable course in every sense to consider, not how you can fit them all into a Chinese puzzle of rules, sub-rules, exceptions and sub-exceptions, but which of them are least likely to hold their own before a court of last resort. If you can find a conclusion which appears to be

the most conformable to principles and rules already settled; if that conclusion does not seem to lead to any such inconvenience as calls for exceptional treatment; and if, on the balance of judicial opinion, it is supported by the weight of binding or persuasive authorities in your own and other leading jurisdictions, then you had better make up your mind that refined qualifications will not easily be fastened on it. Certainly these questions may well be *inter apices juris* and divide the most learned opinions. Yet there must be a more and a less promising way of approaching them, and I think the sounder attitude of mind is that which I have indicated. Sometimes it may be necessary to frame an argument against the application of that which one suspects to be the better opinion in law (I say suspects because, as Dr. Johnson rightly observed, you have no business to think you know it until the court has decided). In such a case the prudent advocate will, if he can, throw his strength in the direction of arguing on the facts that the rule does not apply rather than commit himself to a battle of pure law in an unfavourable position. There is yet another temptation of the elect, and I think it is the most insidious of all, judged by the number of cases in which competent and even eminent persons have yielded to it. I mean the habit of admitting exceptions and anomalies in detail on the ground of immediate convenience. Oftentimes the sum of many such little concessions to convenience is the grave inconvenience of nobody knowing whether any rule at all is left. I do not deny that, if the original rule was a bad one, this way of escape from it may be better than none. But in a question of this kind it may very well turn out, on careful examination, that the principal rule has been too narrowly conceived or expressed, and that when it is rightly apprehended, no exception has to be made in order to arrive at a reasonable result. It is always worth while to give one's best consideration to the authorities from this point of view.

Another object for which we can all do something, for there are so many ways of helping that any man may find at least one pretty near his hand, is that of keeping the movement of our native jurisprudence to its proper lines. Our lady the Common Law will note other people's fashions and take a hint from them in season, but she will have no thanks for judges or legislators who steal incongruous tags and patches and offer to bedizen her raiment with them. Assimilation of foreign elements, we have already seen, may be a very good thing. Crude and hasty borrow-

ing of foreign details is unbecoming at best, and almost always mischievous. When you are tempted to make play with foreign ideas or terms, either for imitation or for criticism, the first thing is to be sure that you understand them. Nothing is easier than to misunderstand little bits of another system. One may read in very learned English authors that there is no specific performance in French law, for which these authors proceed to give every reason except the real one. The matter is really quite simple. Modern French law has done for the sale of all kinds of property what the Common Law did in the Middle Ages for the sale of ascertained goods, made a complete contract of sale pass the whole legal interest without any further act of transfer. Thus the purchaser is at once owner; and, being armed with all the rights and remedies of an owner, he has no need of any such remedy as our action for specific performance of a contract to sell real estate. Those learned persons, again, having overlooked the general provisions of the French law as to sale, naturally failed to see its incidents in the proper light, and put questions to learned Frenchmen which they in turn, knowing nothing of our peculiar law of property nor the mysteries of the legal estate, did not rightly apprehend. Hence one may draw the moral of a supplemental warning. Beware of putting categorical questions to a foreign expert without explaining to him the general bearing of your inquiry and the conditions taken for granted by English-speaking lawyers. Otherwise you may get an answer that is literally correct but substantially misleading, and discover too late that you have been talking at cross purposes. Then comes the case where you think to find some profit in imitation. Here the next thing, after you have mastered the foreign matter, is to have a clear view of the end to be served by taking it as a model, and to make sure whether it cannot be served as well or better by methods already known to our own law.

A fair specimen of what ought to be avoided may be found in the English Act commonly called Lord Campbell's Act, and now officially cited by the not wholly accurate short title of the Fatal Accidents Act. The example is convenient because this Act has been widely imitated in other jurisdictions, and none the worse because it has been useful in spite of its defects, and is not involved with any burning social or economic question. In its infancy the Common Law knew nothing of executors and very little of wills. The testament of personal estate, and there-

fore the executor, were introduced by ecclesiastical jurisdiction, although the executor has a fine old Germanic pedigree. So the right of an executor to sue in the king's courts for the benefit of his testator's estate was brought in piecemeal and not without help of statutes. Most unluckily some one got hold of a supposed Roman maxim, for which there is really no authority, that "personal actions die with the person." By further ill luck an opinion for which classical Roman warrant does exist came to reinforce this pretended authority, the opinion that a free man's life is incapable of pecuniary valuation. It is a fine ethical observation, but, I venture to think, inappropriate in the field of legal justice. In the result, the Common Law was saddled with the rule that the death of a human being cannot give rise to a civil cause of action, one of the most foolish rules, if I dare say so, that have ever been adopted by the courts of a civilized country; and we have to learn for law that, except for statutory exceptions, and apart from criminal liability, a man wounds or disables another at his peril,[1] but may kill him outright with impunity. Surely a wise legislature might have made a clean piece of work and repealed the apocryphal maxims altogether. Instead of this our Parliament was advised to borrow from Scotland provisions which, for aught I know, may have a perfectly fit place in the body of Scottish law, and to confer an anomalous cause of action, not on the legal representative of the deceased person who might have brought an action himself if he had not been killed, but directly on a class of persons who might be presumed to suffer by his death as being dependent on him. In other cases the absurdity of the general rule remained uncorrected; our Court of Appeal has held it too inveterate to be touched; and there is no prospect of rational and comprehensive legislation.

We may take another example from the theoretical study of the Common Law. During the nineteenth century it was rather fashionable for speculative writers to assume that the Roman doctrine of Possession was more complete and scientific than our own. This, I believe, was only because they had not taken the pains to grapple with the authorities of our law on trespass, disseisin, trover and possessory remedies generally. It may be admitted that the labour would have been considerable; certainly I found it so when

[1]Subject, in modern law, to diverse causes of justification and excuse which ancient law did not recognize; but these distinctions are not relevant to the matter now in hand.

I tried my own hand, even with the most valuable help which I derived from working in association with my learned friend the late Mr. Justice Wright, who had made a special study of the subject with reference to the criminal law. The result, however, was to show that the doctrine of Possession in the Common Law, scattered as it is in various decisions partly in civil and partly in criminal jurisdiction, and arising out of the most varied facts and transactions, can be accounted for by a few comprehensive principles which are both more elegant and in closer touch with the conditions of actual life than any of the formulas which the ingenuity of modern commentators has extracted from the sayings of the classical Roman jurists. In these lectures I have purposely avoided any technical exposition, yet for the honour of our lady the Common Law I will state these principles in their simplest form. First, possession in fact is such actual exclusive control as the nature of the thing, whatever it may be, admits. Secondly, possession in law, the right which is protected by possessory remedies, generally follows possession in fact, but does not necessarily cease when possession in fact ceases. The chief exception to this rule is that a servant in charge of his master's goods has not possession in law; and reflection shows that, whatever the origin of this exception may be, it conforms to common sense; for in fact a servant not only is bound to exercise his physical control according to his master's will, as and when it is signified, and not his own, but in ordinary cases he does not even appear to be dealing with the thing in his own right, and no man using common attention and judgment would suppose that he claimed any such right. Thirdly, possession in law continues until determined in some way which the law definitely recognizes, beyond the mere absence or failure of a continuing intent to possess. Fourthly, possession in law is a commencement of title, in other words the possessor can deal with the thing as an owner against all persons not having a better title, and this protection extends to persons deriving title from him in good faith. Fifthly, when possession in fact is so contested that no one can be said to have actual effective control, possession in law follows the better title. It is true that every one of these principles, in its application to the complex facts of life, may call for careful and even subtle elaboration. But I am free to maintain that in themselves they are adequate and rational. We take the line of making legal possession coincide with apparent control so far as possible; the Roman law takes the opposite line of unwillingness to separate legal possession

from ownership or what we call "general property;" and I venture to think our way both the simpler and the better. It is fortunate that our courts were never beguiled by Continental learning, well or ill understood, into departure from our native line of advance; and it does not matter how much of their refusal to listen to any voice of Roman charmers was due to deliberate wisdom, and how much to pure ignorance of the voluminous and controversial literature which, so far as I know, has not yet produced any generally accepted theory in modern Roman law. Not that the Roman law is to be neglected by those who have time to attend to it, for it furnishes many instructive parallels, still more instructive contrasts, and many ingenious suggestions. But there is no reason for believing that our Germanic ideas of seisin, from which our native doctrine has sprung, have in them less of the true root of the matter.

At this point, or earlier, I am sure a reflection will have occurred to you which at first sight is discouraging. All we have heard, you will say, may be very true. We are willing to believe that the general course of a lawyer who wishes to do credit to his art has been indicated on sound lines. But when we come to face an actual problem in its complexity, will any such monitions make us sure of handling it in the right way? Now it would be neither wise nor honest to shirk this question. The answer is quite plain: They will not. The same answer holds in all science and art whatsoever. No one else can do your own work for you, and no one can learn to do anything worth doing by so cheap a way as hearing or reading about it. Apprenticeship is the only road to craftsmanship, and no man can expect to learn without making mistakes. But the experience of elders may at least help you to start in the right direction and to avoid perverse and gratuitous errors. Reading the map will never get a man up a mountain, but the prudent climber will not therefore omit to study the best map available. Our maps are not perfect, but they are good enough to be useful.

And now that we have followed our lady the Common Law through vicissitudes of success and failure, walking with her familiarly, not slavishly, how does it stand with our affection for her? Shall we be tempted to belittle her work because it is in rough and stubborn material, and all the toil of her servants has not wholly purified the fine gold from the dross? There was a great English writer, one who had gone through the forms of studying the law and was nominally qualified to practise. He

wrote an excellent description of life in the Temple as it was in his youth; his name was Thackeray. He drew the picture of a student wholly absorbed in his profession, in contrast to the diversions of Pendennis and his friend Warrington, and this is what he said of Mr. Paley, the type of an industrious and concentrated lawyer, a type we have all seen more or less realized in the flesh: "How differently employed Mr. Paley has been! He has not been throwing himself away: he has only been bringing a great intellect laboriously down to the comprehension of a mean subject."[2] I venture to pronounce these words not worthy of Thackeray. Mr. Paley's way of handling the subject might be mean; that gives no man a right to call the subject itself mean. Even so, I am apt to think Mr. Paley may be maligned. Every man who takes his profession seriously must be content for a time to give his whole mind to it and think of little else, not to abolish his other interests (which would be the worse for his profession in the end), but to restrain or suspend them for a while. How did Pendennis and Warrington know what other and unselfish objects Mr. Paley might be working for? How could they be certain that he had not a mother or sisters looking to him for support? Did they see anything of his pursuits and recreations in vacation time? One very learned person of Lincoln's Inn, who might in a superficial way have sat for Mr. Paley's portrait, was known in the Alpine Club about fifty years ago as a member of the party which made one of the most daring expeditions in the Bernese Oberland in the Club's heroic age of conquest. His one besetting fault was an excess of conscientiousness from which no one suffered so much as himself. But let Thackeray's lapse pass, a mere slip of the pen I would fain think, for in truth he was a man of a generous nature and would not have written so in malice. Macaulay's lament over Fearne's devotion of a lifetime to "the barbarous puzzle of contingent remainders," was better justified. As to that I will merely say that our lady the Common Law is not answerable for the Statute of Uses and all the puzzles and perplexities it brought in its train. We shall not think the less of her for not being infallible and invincible. Some say she is a hard mistress. It is true that she will not be content with any offering short of a man's best work: she would not be faithful to herself if she were. Some call her capricious. It is true that she does not undertake to command worldly success for her followers; earthly fortune may be added to them, but is not the reward she

[2]Pendennis, ch. xxix.

promises. There are some who call her arbitrary. True it is that we have to learn her speech, but when we have learnt enough of it to speak it freely we know that open discussion and unfettered criticism are the very life of the law. Some complain of her tongue as barbarous. Well, the Latin of Roman law falls short, at best, of classical perfection, and when one gets below the surface of our medieval books, French and Latin, one finds them at least as human as the Digest and far more living and human than Justinian's Institutes and the glossators. Rather we may praise our lady the Common Law in the words of a poet who was not a lawyer, words not written concerning her, and nevertheless appropriate.

> Our lady of love by you is unbeholden;
> For hands she hath none, nor eyes, nor lips, nor golden
> Treasure of hair, nor face nor form; but we
> That love, we know her more fair than anything.

Now this was written by Algernon Charles Swinburne in praise of Liberty at a time when the powers of darkness were still very strong on the Continent of Europe. There is ample warrant in medieval usage for appropriating verses of any author in one's own sense, whether connected with that author's or not; and our lady's traditions are nothing if not medieval. But we may find a less artificial justification. For if there is any virtue in the Common Law whereby she stands for more than intellectual excellence in a special kind of learning, it is that Freedom is her sister, and in the spirit of freedom her greatest work has ever been done. By that spirit our lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal public justice and ordered right into every quarter of the world. By the fire of that spirit our worship of her is touched and enlightened, and in its power, knowing that the service we render to her is freedom, we claim no inferior fellowship with our brethren of the other great Faculties, the healers of the body and the comforters of the soul, the lovers of all that is highest in this world and beyond. There is no more arduous enterprise for lawful men, and none more noble, than the perpetual quest of justice laid upon all of us who are pledged to serve our lady the Common Law.

(THE END.)

FREDERICK POLLOCK.

LONDON.